

ARBITRATION ADVISORY

96-04

VOIDABILITY OF FEE AGREEMENTS

September 13, 1996

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INTRODUCTION

During the course of a fee arbitration hearing, it may appear to the arbitrators that the attorney has not complied with the requirements of Business and Professions Code Section 6147 or 6148. When such a determination is made, the fee agreement is voidable at the option of the client. If the client elects to void the agreement, the attorney may not recover the contract fee. However, the attorney is entitled to a reasonable fee. Often the client is unaware of the right to void the agreement and the consequences of such an election. The question is whether and to what extent the arbitrators should inform the client of the option to void the fee agreement and the consequences of such an election.

ANALYSIS

This Advisory should be read in conjunction with the Arbitrator Advisory 93-02 dated November 23, 1993, "Standards of Review in Fee Disputes Where There is a Written Agreement." That Advisory includes the suggestions that, when the arbitrator is presented with a written fee agreement, the first step in the analysis should be to determine whether it is enforceable under basic elements of contract law and whether it complies with Business and Professions Code Section 6147 or 6148.

In making this determination, the arbitrator may question the parties to obtain information pertaining to the attorney's compliance with the requirement of the Business and Professions Code. Arbitrators have their own styles of conducting arbitration proceedings; some may be more aggressive in their questioning of witnesses, while other may adopt a more passive approach. Arbitrators may use their discretion in how they choose to elicit relevant testimony.

If the arbitrators determine that the fee agreement is not in accordance with the requirements of Business and Professions Code Section 6147 or 6148, or that the attorney has not otherwise complied with any provisions of Section 6148, including

the failure to render complete or timely billings, then they must decide whether and in what manner the client has exercised the right to void the agreement. Some arbitrators believe that they should advise the parties of the client's option under the Business and Professions Code to void the agreement, request the parties to provide evidence of the reasonable value of the attorney's services, and advise the client that the reasonable fee may be more or less than the contract fee. Other arbitrators believe that they should do nothing and void the agreement only if the client independently makes the election, while others take the position that they should do nothing and deem the client to have made the election only if voiding the agreement would result in a lesser fee to the attorney.

RECOMMENDATION

While the Committee recognizes that there are different approaches, the Committee recommends an approach which it believes is consistent with the statutory language of Business and Professions Code Sections 6147 and 6148 and which will result in more consistent and fair handling of fee arbitration cases throughout the state. In developing this approach, the Committee has made the following assumptions:

An attorney should not be rewarded for failing to comply with statutes by being awarded a fee in excess of the contract fee. Therefore, a "reasonable fee" under Business and Professions Code Sections 6147 or 6148, should never exceed the contract fee.

Because the client's maximum exposure is the contract fee, the client will always make the election to void the contract.

The client's objection to the fee and the request to arbitrate constitute the client's election to void the agreement.¹

With these assumptions in mind, once the arbitrator has determined that the attorney has not complied with the provisions of Business and Professions Code Sections 6147 or 6148, the arbitrator may consider the agreement voided and determine a reasonable fee that is no greater than the contract fee. This approach preserves the arbitrator's neutrality, while providing the parties with a reasoned result based on general principles of contract law and the public policy underlying the fee arbitration statutes.

¹ The statutes do not prescribe the time or manner in which the election must be made ("Failure to comply with any provision of this section renders the agreement voidable at the option of the client..."); thus, it is consistent with the statutory framework for an arbitrator to find that the client has exercised the option by the act of objecting to the fee if the arbitrator also finds that there has been a failure by the attorney to comply with any provision of Section 6147 or 6148